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No. 07-15

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

ROBERT M. GATES, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

AMICUS CURIAE BRIEF OF 411 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 411 United Kingdom and European parliamentarians, including 299 current or former Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, 111 current or former Members of the European Parliament, and a former Vice President of the European Commission (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, both geographically and politically. The *amicus* group spans the political spectrum, and includes senior figures from all the major political parties in the United Kingdom, including former Cabinet Ministers. The group also includes judges of the highest court in the United Kingdom, senior lawyers, and Bishops of the Church of England.

The same *amicus* group has filed briefs in support of Petitioner Hamdan's previous petitions in this Court. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court upheld Hamdan's claims under the Geneva Conventions and Uniform Code of Military Justice ("UCMJ"). Since then, Congress has enacted the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, section 7 of which the courts below interpreted to require dismissal of Petitioner's habeas petitions.

As before, *amici* express no view on whether Petitioner has engaged in acts of terrorism or any conduct in violation of the laws of war, international law more

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

generally, or U.S. law. Nor do *amici* seek to express any view on politics or tactics in the "war on terror" in general. These are questions on which *amici* may hold differing individual views.

Amici have participated in this case from the outset because, despite their divergent political views, they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, the United States comply with the standards set by international humanitarian law and human rights law and, fundamentally, with the rule of law itself. *Amici* have previously taken part in these proceedings to urge this Court to ensure that the treatment accorded to prisoners such as Petitioner—innocent until proven guilty, be they ultimately found to be terrorists or not—meet these standards. In particular, *amici* have come together to endorse the view that, even in the face of the terrorist threat, law and in particular international law has scope to operate and acts to prevent the existence of legal "black holes" within which individuals are stripped of fundamental legal protections recognized by all civilized nations and enshrined in international humanitarian and human rights law.

Amici come together again now—in support not only of Petitioner's petition for certiorari in this case, but also of his motion for reconsideration in case No. 06-1169—to urge this Court to act. *Amici* consider that the provisions of the MCA, such as section 7, which purport to interfere with habeas actions brought by an alien "determined by the United States to have been properly detained as an enemy combatant or...awaiting such determination," fundamentally offend the rule of law and contravene treaties by which the United States is bound and upon which it is built.

Amici welcome the Court's recent decision to grant petitions for certiorari in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196, two cases

involving Guantanamo detainees who have not been charged with offenses triable by military commission. *Hamdan* presents substantially the same question as *Boumediene* and *Al Odah*, namely whether detainees at Guantanamo Bay are entitled to rely on the writ of habeas corpus to challenge their continued detention. In addition, *Hamdan* presents a further necessary and indispensable counterpart question: whether Petitioner can rely on the writ to challenge, on a pre-trial basis, the military commission process set up to try him and other detainees at Guantanamo. Therefore, if this Court is to hear *Boumediene* and *Al Odah*, it should hear *Hamdan* as well. The fundamental rights enjoyed by Petitioner extend to all held in detention by the United States, at Guantanamo and elsewhere. Accordingly, the Court should hear Petitioner's case to ensure uniformity of treatment of detainees and uniform compliance with international law.

The writ of habeas corpus has from the days of King John been fundamental to any valid concept of liberty. It is the cornerstone of "government of laws and not of men." Building on this ancient foundation, international human rights treaties to which the United States is party enshrine the right of detainees to test the lawfulness of their detention in a court of law. Were the MCA to be found to deny this right to detainees such as Petitioner, this would be incompatible with the rule of law and with the United States' international legal obligations.

Moreover, insulating the military commission process from habeas review, which is the effect of the decisions below, would expose Petitioner to further violations of his human rights and would be inconsistent with the United States' international legal obligations. For a state such as the United States to persist in conduct that defies international law does incalculable violence to the rule of law and to the vitality of international human rights and humanitarian law—binding legal norms that reflect the very principles that

differentiate the peoples of civilized nations from those who acquiesce in unlawful acts of terror.

The outcome of this case is of course of enormous personal significance for Petitioner. The rulings of this Court in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), reasserted the rule of law and constrained not the Government's conduct of the war on terror but only its efforts to cast individuals detained at Guantanamo Bay out of the reach of legal protection into a legal "black hole." The MCA and the decisions below threaten to undo those rulings and to deprive Petitioner and other detainees of that most fundamental touchstone of liberty, the writ of habeas corpus. Absent this touchstone, Petitioner has no means to vindicate his well founded claims that trial by military commission would violate his fundamental rights.

Each member of the *amicus* group has been privileged to serve a state committed to the rule of law, and each has an interest in seeing the rule of law upheld. Insofar as the provisions of the MCA that purport to insulate the military commissions from habeas review stand, the United States will in effect have declared that the fundamental principle of the rule of law upon which this nation was built is set aside in the face of a terrorist threat. That would bode ill for the future of all liberal democracies and the efforts of the community of liberal democracies to encourage and enforce respect for international human rights and humanitarian norms and the rule of law around the world. Accordingly, *amici* urge this Court, with the eyes of the world now turned toward it, to grant the Petition and affirm that the United States will not sacrifice the integrity of its legal system and the values which it espouses and holds dear to the terrorist threat.

To paraphrase Lord Hoffman's speech in the House of Lords, describing the stark choice the Government of the

United Kingdom faced when deciding on rules for the detention of terrorist suspects: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for [this Court] to decide whether to give the terrorists such a victory." *A and Others v. Secretary of State for the Home Department* [2005] H.L.L.R. 1, 53 (per Lord Hoffman).

SUMMARY OF ARGUMENT

Amici believe that (i) the gravity of the issues involved, issues which concern not only the parties but all nations and most particularly those who share the commitment of the United States to the rule of law and (ii) the need to halt violations of international law by the United States require that the Petition be granted and the case be heard by this Court on an expedited basis.

ARGUMENT

I. The Interests Of All Parties And The Wider World Are Served By An Expeditious And Definitive Resolution Of The Important Questions Presented In This Case.

Amici appreciate that the procedure contemplated in the Petition is extraordinary and that the Court has already denied certiorari before judgment in this case once before.[2]

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[2] Since that denial of certiorari, however, there have been a number of developments that increase the urgency of the need for guidance from this Court. For example, *amici* note that the military commission proceedings against Petitioner have collapsed because the Combatant Status Review Tribunal process did not make the determination required under the MCA that Petitioner is an *unlawful*

However, the circumstances of this case and the significance of the legal questions presented are also extraordinary. Without doubt, the matters raised are of imperative public importance and merit immediate determination by this Court.

Granting the Petition at this stage will serve the interests of all parties. Petitioner is crucially concerned with ensuring the legitimacy of any process to which he will be subject. The judgments below effectively deny him any forum in which to do so. Unless this Court acts to ensure that Petitioner may be heard, he will face prosecution in a process which both the international community and history may ultimately regard as unjust and unworthy of the United States' long commitment to human rights and the rule of law.

For this reason, the interests of the United States will also be served by this Court granting the Petition: Until Petitioner's challenge to the legality of the military commission process is heard and resolved in regularly constituted courts of law, the legitimacy of that process will continue to be questioned, as will the commitment of the United States to the rule of law. The decisions below threaten to bar any consideration of Petitioner's well-founded allegations that the military commission process denies him fundamental rights that are secured by, among other things, treaties to which the United States is party and by which it is bound.

Indeed, Petitioner's own case, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), firmly underscores the need for immediate, pre-trial, review to test the legitimacy of the military commission process. Had this Court not granted certiorari in that case, but instead accepted the government's position that review of the military commission process

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enemy combatant, rendering the commission constituted under the MCA without jurisdiction.

should be permitted only after the commissions had been held, Petitioner—together with numerous other detainees—would have been subjected to trials, and perhaps convictions resulting from those trials, which did not offer many of the fundamental protections enshrined in international law. Those trials would then undoubtedly have been open to the same objections as were recognized and accepted by this Court in its ruling of June 2006.

The significance of the issues raised is not restricted to the national level. Habeas corpus and the commitment to the rule of law and fundamental principles of liberty that it reflects are the common heritage of civilized nations. The writ itself pre-existed the United States, and it is embodied in the national law of countless countries and, importantly, in multiple international human rights treaties by which the United States is bound. The Supreme Court of Canada recently reaffirmed the enduring importance of habeas corpus to civilized nations. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. For these reasons, this Court's ruling on the scope of habeas jurisdiction will resound within legal systems worldwide, both national and international. And any deviation from the liberty and rule of law values enshrined in the Great Writ would pose a challenge to efforts by the community of liberal democracies to encourage and enforce commitment to due process and the rule of law around the world.

Amici recall that this Court has granted certiorari before judgment in the past where cases of such exceptional importance have come before it. The case for certiorari before judgment here is at least as strong as, if not stronger than, it was in *Ex parte Quirin*, 317 U.S. 1, 19 (1942), where this Court granted certiorari before judgment "[i]n view of the public importance of the questions raised...and because in [the Court's] opinion the public interest required that [the Court] consider and decide those questions without any

avoidable delay." This is a case which has serious and urgent implications for Petitioner, the United States and the international community more generally. In light of the extraordinary circumstances of this case and the significance of the legal questions presented, *amici* urge the Court to grant the Petition.

II. Granting The Petition Is Necessary To Prevent Violations Of International Law.

A further imperative is for the United States to come back into compliance with its binding obligations under international law. The MCA, both in its "jurisdiction-stripping" provisions and its provisions relating to the military commission process, violates international law in that it denies to Petitioner fundamental rights secured by international human rights treaties and Common Article 3 of the Geneva Conventions of 1949, by which the United States is bound. The Court can avoid this violation by granting the Petition and interpreting the MCA consistently with international law, *cf. Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"), or invalidating those aspects of the statute that contravene international law.

A. Insulating Military Commissions From Habeas Review Itself Violates International Law.

Were the Government to succeed in denying the jurisdiction of the courts even to hear claims concerning the legality of continued detention and the military commission process to which Petitioner is to be subjected, this would directly conflict with the clear and well settled principle of international human rights law, by which the United States is bound, that a detainee has the right to challenge the legality of his detention in court. This Court should grant the Petition

in order to prevent this violation of international law by the United States.

The fundamental right of an individual detained by authority of a state to challenge the legality of his detention is enshrined in numerous instruments of international law that bind the United States, including:

(1) Article 9(4) of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR"): "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"; and

(2) Article 7(6) of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR"): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

The United States has ratified the ICCPR and is therefore bound by its terms. *See* U.S. CONST. art. VI, cl. 2. Although the United States has not ratified the ACHR, it has signed it and is therefore bound not to defeat its object and purpose and must avoid taking any action that is inconsistent with the rights set out therein. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

The right articulated in article 9(4) of the ICCPR and article 7(6) of the ACHR has its origins in the Anglo-American writ of habeas corpus; these treaty provisions mirror in international law the protections enshrined in national law provisions, including the provisions of article I, section 9, clause 2 of the United States Constitution. The obligation to provide a person deprived of liberty with an

opportunity to challenge the lawfulness of detention (described by scholars of international law as the right of habeas corpus) is also recognized as an aspect of the customary international law of war. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 349-52 (2005).

As such, the right to challenge the legality of detention is one of the most fundamental of the "judicial guarantees which are recognized as indispensable by civilized people" referred to in Common Article 3 of the 1949 Geneva Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364. Indeed, although some of the rights protected by international law may be derogated from in time of war or emergency, international tribunals charged with the application and implementation of international human rights treaties concur that this particular right cannot be made to yield. *See* Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of Jan. 30, 1987, *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.doc; Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of Oct. 6, 1987, *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_09_ing.doc; Inter-American Court of Human Rights, *Case of Neira Alegria and Others*, Judgment of Sept. 19, 1996, *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_29_ing.doc (characterizing the writ of habeas corpus as among those judicial remedies that are "essential" for the protection of fundamental rights that persist in times of war or emergency). *See also* U.N. Human Rights Committee, *General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29 (Aug. 31, 2001), *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm

("[I]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.").

This Court has already recognized that the protections of Common Article 3 apply to Petitioner Hamdan (and others in his position). *See Hamdan*, 126 S. Ct. at 2795-96 (concluding that "Common Article 3...is applicable here and...requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'"); *id.* at 2802 (Kennedy, J., concurring) (describing Common Article 3 as "one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan" and observing that this "provision is part of a treaty the United States has ratified and thus accepted as binding law"). The strictures of the ICCPR and the ACHR, as well as customary international law, also oblige the United States to provide Petitioner with means of challenging the legality of his detention.

In the law of the United States, the means by which individuals detained by the power of the state vindicate this right has been through the mechanism of habeas corpus. The District Court found that, pursuant to the MCA, the writ of habeas corpus is not available to Petitioner to challenge the legality of his detention. Accordingly, the effect of the judgments below is to deny Petitioner's fundamental human rights, rights which the United States has pledged itself to uphold and is legally bound to secure. The Court can and should prevent this violation of international law, *cf. The Charming Betsey*, 6 U.S. (2 Cranch) at 118, by granting the Petition and reaffirming Petitioner's access to the writ of habeas corpus.

B. Insulating Military Commissions From Habeas Review Would Allow Further Violations Of International Law.

The treatment of Petitioner and others detained at Guantanamo Bay (and elsewhere), to date and under the MCA, deviates from the most basic and fundamental norms of procedural fairness, respect for liberty and due process that are recognized in international law. The Court should grant the Petition in order to enable meaningful judicial scrutiny of the military commission process and to halt these violations.

1. Violation Of Speedy Trial Rights

Chief among the violations of Petitioner's rights is the denial of a speedy trial to resolve the allegations belatedly made against them. The right to a speedy trial, which is a fundamental component of the right to a fair trial, is enshrined in numerous instruments of international law, including:

(1) Article 9(3) of the ICCPR, which states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"; and

(2) Article 7(5) of the ACHR, which provides that "any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings".

Accordingly, U.S. courts recognize the right to a speedy trial, as protected by international law. In *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998), citing the Restatement (Third) of the Foreign Relations Law

of the United States and various international instruments, including the ICCPR, the Court of Appeals held that "there is a clear international prohibition against arbitrary arrest and detention", and that "detention is arbitrary 'if...the person detained is not brought to trial within a reasonable time'." 141 F.3d at 1384; *accord Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995).

Significantly shorter periods of pre-trial detention than those which Petitioner has endured have been found to violate international law. *See, e.g., Sextus v. Trinidad and Tobago*, H.R.C. Communication No. 818/1998 (July 16, 2001) (holding that a period of twenty-two months' detention violated ICCPR article 9(3)). The United States has not complied with its obligations under the ICCPR or the ACHR by holding Petitioner in pre-trial detention for some five years. And the MCA explicitly denies to Petitioner and other detainees the right to a speedy trial. *See* MCA, *supra*, § 3(a) (disapplying provisions of UCMJ relating to speedy trial to trial by military commission).

2. Violations Of Generally Recognized Principles Of Regular Judicial Procedure Secured By Common Article 3

Petitioner's claims that military commissions will not provide a process that meets basic standards of fairness and due process are well founded. In at least two respects, the military commission process under the MCA will deny Petitioner the "judicial guarantees which are recognized as indispensable by civilized nations" that are required under Common Article 3.

First, the MCA authorizes military commissions to try Petitioner for the charge of "conspiracy," which is not a recognized violation of the law of war. *See Hamdan*, 126 S. Ct. at 2779 (plurality opinion). In construing the reference in Common Article 3 to "judicial guarantees which are

recognized as indispensable by civilized nations", this Court has found authoritative guidance in Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. As was observed in *Hamdan*:

> this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949.... Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled."

Hamdan, 126 S. Ct. at 2797 (plurality opinion of Stevens, J.) (citation omitted); *see also id.* at 289 (Kennedy, J., concurring) (referring to Article 75). One of these fundamental safeguards is the principle that "No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed." *See* Protocol I, *supra*, art. 75(4)(c). Accordingly, trying Petitioner for conspiracy under an *ex post facto* standard violates the "judicial guarantees" secured by Common Article 3.

Second, the MCA authorizes military commissions to convict Petitioner on the basis of any evidence, even hearsay evidence, that is deemed "reliable" and "probative." Yet Petitioner is not entitled to discover information about the

sources of this information or the methods—including cruel, inhuman or degrading treatment just short of torture, which will not result in the exclusion of evidence—by which it was obtained. A similar feature of the military commissions' structure at issue in Hamdan's previous petition to this Court was described by the Court as a "striking feature" of the ways in which the military commission process deviated from normal procedure, *Hamdan*, 126 S. Ct. at 2786, and it certainly will materially prejudice Petitioner's ability to defend himself in military commission proceedings. For this reason, the military commission process fails to "afford the accused before and during his trial all reasonable rights and means of defense," as is required by article 75(4)(a) of Protocol I, and to secure to Petitioner "the right to examine, or have examined, the witnesses against him," recognized in article 75(4)(g) of Protocol I.

For these reasons, the MCA removes the "judicial guarantees which are recognized as indispensable by civilized nations" as is required by Common Article 3, the international legal standard which this Court has already said applies to Petitioner's treatment and trial by military commission. In these circumstances, the Court should grant the Petition and keep the doors of the courts open to Petitioner. This is the only way to vindicate the rights guaranteed to Petitioner under international law and the only way to ensure that the military commission process will comply with the United States' international legal obligations.

CONCLUSION

As the Government of the United States has itself so often stated, the war on terror is an epic struggle between lawless forces who deny our common humanity and who disregard the most basic rules of civilized behavior and the rest of the world—committed to liberty, equality before the

law and the rule of law. This struggle surfaces in the "jurisdiction-stripping" provisions of the MCA, and their assault on the rule of law. The Court should grant the Petition—as it has in *Boumediene* and *Al Odah*—in order to continue in the direction it has taken in *Rasul* and *Hamdan*: to prevent the creation of a legal "black hole"; to counter the isolation of individuals detained at Guantanamo Bay from legal protection and their treatment from legal scrutiny; and to ensure that the standards that the United States and its legal system uphold are extended, as they are required under international law to be, to all people under the control of the United States. In so doing, the Court can reinforce human rights and the rule of law, ensure compliance with the international legal obligations of the United States, and do great service to the authority of international law generally and, specifically, to the liberal principles upon which the world's democratic states are founded.

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